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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUZANNE CRUISE CREATIVE SERVICES, INC., a Kansas corporation, and LAURIE COOK, an individual,

Plaintiffs,

-v-

BARRINGTON STUDIOS LTD, a New Hampshire corporation, ANTHONY SPERANDEO, an individual, GEORGE LENCSAK, an individual, SHOPKO STORES OPERATING CO., LLC, a Delaware Limited Liability Company, FRED MEYER STORES, INC., a Delaware corporation, WAL-MART STORES, INC., a Delaware corporation, CVS CAREMARK CORPORATION, a Delaware corporation, DOLLAR GENERAL CORPORATION, a Tennessee corporation, DOLLAR TREE, INC., a Virginia corporation, BIG LOTS, INC., a Delaware corporation, and Does 1-20,

Defendants.

CIVIL ACTION

Index No: 10-cv-4293 (PKC)

ECF Filed

DEFENDANT GEORGE LENCSAK'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant George Lencsak ("Lencsak") moves to dismiss the claims against him in Plaintiffs' First Amended Complaint and respectfully requests that this Court dismiss those claims pursuant to Fed.

R. Civ. P. 12(b)(2), or in the alternative, pursuant to Fed. R. Civ. P. 12(b)(6).[1]

I. Facts

In 2006, plaintiff Suzanne Cruise Creative Services, Inc. ("Cruise") negotiated a license agreement that gave defendant Barrington Studios Limited the right to use plaintiff Laurie Cook's artwork on stationery products such as gift boxes and bags that Barrington produced and sold to various retailers. (Dkt. No. 25, Ex. F.) The agreement, which was the product of discussions among Cruise"s principal, Suzanne Cruise, and Barrington's shareholder and officer, Kristene Burleigh, explicitly identified the artwork licensed, the royalty and other material license terms. (*Id.*) Although the parties did not execute the written version of this license, plaintiffs demonstrated their agreement to the terms and conditions set forth therein by sending to Barrington high-resolution camera ready artwork -- a tender that Cruise admits it would not have made absent an agreement. (Dkt. No. 26, ¶ 11; Dkt. No. 25, Ex. E.) Barrington in 2007 and 2008 used the high-resolution artwork to manufacture products sold to defendants Shopko, Fred Meyer, Wal-Mart, CVS, Dollar Tree, Dollar General and Big Lots, generating a royalty obligation to Cruise of roughly $27,000. Unknown to Barrington, Cruise also entered into purportedly exclusive licensing agreements covering the Laurie Cook artwork with other manufactures of stationery products. (*See, e.g.*, Dkt. No. 1, ¶ 17.) Apparently now seeking to evade the license it previously granted to Barrington, Cruise and its client Cook filed this lawsuit alleging a staggering $1,000,000-plus copyright infringement claim against not only Barrington and its retail customers, but also Barrington's shareholders. (Dkt. No. 40 (or "Compl."), ¶¶ 72, 77.) Cruise also sought to interfere with Barrington's business relationships by falsely accusing Barrington of copyright infringement in conversations with Barrington's existing customers. (Dkt. No. 25, Ex. H (communication with Dollar General).)

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[1] Lencsak previously detailed this motion in a pre-motion conference letter dated September 13, 2010, pursuant to section 2(A)(1) of this Court's Individual Practices. (*See* Ex. 1 to the Declaration of Kristine M. Mentone, Esq. ("Mentone Decl."), submitted herewith.) In the Civil Case Management Plan and Scheduling Order, the Court ordered the deposition of Mr. Lencsak limited to issues of personal jurisdiction within 45 days (later extended to November 30, 2010, *see* Dkt. No. 21) and stated that "[t]hereafter defendant Lencsak may move to dismiss for lack of personal jurisdiction and under Rule 12(b)(6). The time to answer or move by Lencsak extended until then." (Dkt. No. 17.) The First Amended Complaint ("Complaint") suffers the same deficiencies. (See Dkt. No. 40.)

During the relevant time period (2006), George Lencsak, a New Hampshire domiciliary with no personal business contacts with the State of New York (*see* 28:4-10), was one of the three Barrington owner-shareholders. (Mentone Decl., Ex. 2 (November 30, 2010 George Lencsak Deposition Transcript ("Tr.")) at 5:9-13, 11:5-11.) At that time, his fellow-shareholder, Burleigh, handled licensing for Barrington. As such, Lencsak had no responsibilities for licensing nor participated in any negotiation of the licensing with Cruise. (See Mentone Decl., Ex. 2, Tr. at 24:24-25:3; 26:21-27:4; 28:21-29:19). As discussed in greater detail below, his sole alleged -- and actual -- connection to this case is his ownership of Barrington stock. (Dkt. No. 40, ¶ 22.) Such allegations -- or the absence thereof -- neither provide a basis for this Court to assert personal jurisdiction over Lencsak nor a state a claim against him.

II. The First Amended Complaint

Plaintiffs Cruise and Laurie Cook ("Cook") (collectively, "Plaintiffs") assert six causes of action in this case: (1) Copyright Infringement; (2) Contributory Infringement; (3) False Designation of Origin and Unfair Competition; (4) Common Law Trade Dress Infringement; (5) Common Law Unfair Competition; (6) N.Y. General Business Law § 360-1. Each of these claims arises out of a business transaction that took place between plaintiffs Cruise and Cook and defendant Barrington Studios Ltd. ("Barrington"). Lencsak is not alleged to have been personally involved in any of the business transactions between Cruise, Cook and Barrington, and appears to have been named solely based on his status as one of Barrington's principals.

III. The Complaint Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(2).

Personal jurisdiction over defendant Lencsak should be determined by the law of the State of New York. See, e.g., Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir.1985); Unique

Indus., Inc. v. Sui & Sons Int'l Trading Corp., 2007 WL 3378256, at *3 (S.D.N.Y. Nov. 9, 2007); Yash Raj Films(USA) Inc. v. Dishant.com LLC, 2009 WL 4891764, at *3 (E.D.N.Y. Dec. 15, 2009). It is Plaintiffs' burden to establish that there is personal jurisdiction over Lencsak in New York. Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir.1996). Plaintiffs cannot meet that burden.

(a) There Is No Personal Jurisdiction Under CPLR § 301.

There is simply no basis for the exercise of personal jurisdiction over Lencsak under section 301 of New York's Civil Practice Law and Rules ("CPLR"), New York's general personal jurisdiction statute. Section 301 states that a "court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." CPLR § 301. "[T]he traditional bases of jurisdiction covered by this rule include physical presence, domicile, consent, and corporate presence by virtue of a defendant 'doing business' in New York." Villanova v. Harbilas, 2010 WL 1640187, at *3 (S.D.N.Y. April 13, 2010).

Lencsak is an individual domiciled in New Hampshire. (Compl. ¶ 5; see also Mentone Decl, Ex. 2, Tr. at 4:7-11.) He has not lived in New York or owned real estate in New York since 1989. (Mentone Decl., Ex. 2, Tr. at 31:2-32:4.) He visits his brother once or twice a year in New York but does not transact business with him. (*Id.* at 32:20-33:10.) He does not travel to New York other than for limited business on behalf of Barrington (which is based in New Hampshire, *see* Complaint ¶ 3). (See also Mentone Decl., Ex. 2, Tr. at 8:19-9:20, 18:17-19:21, 20:25-21:5, 28:4-10 (testifying that he does not travel to New York for any business other than Barrington and then only to occasionally attend annual Surtex art shows for Barrington).) Plaintiffs have not alleged that Lencsak consented to jurisdiction in New York or was served with process while in New York; nor can they establish that Lencsak in his personal capacity (as opposed to on behalf of Barrington) engages in "such a continuous and systematic course of 'doing business' here as to warrant a finding of his 'presence' in this jurisdiction." Landoil Resources Corp. v. Alexander & Alexander Services, Inc., 918 F.2d 1039, 1043

(2d Cir.1990). Thus, it is evident that there is not general personal jurisdiction over Lencsak in New York under CPLR § 301.

(b) There is No Basis for Personal Jurisdiction Under New York's Long-Arm Jurisdiction Statute.

Lencsak also is not subject to personal jurisdiction under New York's long-arm jurisdiction statute, CPLR 302(a). CPLR 302(a) provides that a non-domiciliary is subject to personal jurisdiction in New York when the defendant, or the defendant's agent:

> (1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or (2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or (3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or (4) owns, uses or possesses any real property situated within the state.

First, as discussed above, Lencsak is not alleged to have transacted any business in New York in his personal capacity, nor are there any allegations in the Complaint alleging that he did. Thus, there is no personal jurisdiction on CPLR 302(a)(1). Second, Lencsak has not committed any tortious acts in New York, nor are there any allegations to the contrary. Therefore, there is no personal jurisdiction under CPLR 302(a)(2). Third, Lencsak committed no tortious conduct outside of New York, which had an effect in New York, and again, there are no allegations to the contrary. Moreover, even if there were such allegations, Plaintiffs have not alleged or established that Lencsak "(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." Thus, there is no personal jurisdiction pursuant to CPLR 302(a)(3). Finally, Lencsak does not own, use or possess any real property in New York (Mentone Decl., Ex. 2, Tr. at 5:9-6:18), nor are there any allegations in the Complaint suggesting otherwise; thus there is no personal jurisdiction under CPLR 302(a)(4).

Nor can plaintiffs establish personal jurisdiction under a theory of agency or control. See Karabu Corp. v. Gitner, 16 F. Supp. 2d 319, 323-26 (S.D.N.Y. 1998) (Sotomayer, J.) (granting 12(b)(2) motion and rejecting defendants' agency theory: plaintiffs must "show that defendants 'exercised some control' over the tortious actions allegedly committed in New York by TWA personnel. To make a prima facie showing of 'control,' a plaintiff's allegations must sufficiently detail the defendant's conduct so as to persuade a court that the defendant was a 'primary actor' in the specific matter in question; control cannot be shown based merely upon a defendant's title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation"); Arma v. Buyseasons, Inc., 591 F. Supp. 2d 637, 646 -648 (S.D.N.Y. 2008) (granting 12(b)(2) and rejecting agency theory: "while Plaintiffs do provide detailed accounts of [defendant's] role in the Distribution Agreement and the company's activities in connection with that Agreement, they offer no specific allegations of the role [defendant] played in the tortious conduct at issue"); Pilates, Inc. v. Current Concepts Kenneth Endelman, No. 96 CIV. 0043 (MGC), 1996 WL 599654, at *2-3 (S.D.N.Y. Oct. 18, 1996) (granting motion to dismiss as to individual defendant, stating "a general allegation that an officer controls a corporation is not sufficient to establish personal jurisdiction. Plaintiff must allege personal conduct by the officer related to the transaction or tort which is the basis for the claim."); AMPA Ltd. v. Kentfield Capital LLC, No. 00 CIV 0508 NRB, 2001 WL 204198, at *2-3 (S.D.N.Y. Mar. 1, 2001) (noting "individual officers are not subject to personal jurisdiction in New York merely because jurisdiction can be obtained over the corporation"). Here, Lencsak had no involvement in Barrington's licensing until after the death of Barrington shareholder Kristene Burleigh, and therefore was not involved in the licensing transaction at issue. (Mentone Decl., Ex. 2, Tr. at 28:21-29:18.)

Because Lencsak clearly is not subject to personal jurisdiction in New York under either CPLR

301 or 302, the Complaint should be dismissed pursuant to FRCP 12(b)(2). See Barron Partners, LP v. Lab123, Inc., No. 07 Civ. 11135(JSR), 2008 WL 2902187, at *10-12 (S.D.N.Y. July 25, 2008) (granting 12(b)(2) motion and rejecting various 302(a) theories of personal jurisdiction).

IV. The Complaint Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6).

In addition to failing to establish personal jurisdiction over defendant Lencsak, the Complaint also fails to state a claim against Lencsak. To survive a motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556).

The only factual allegation relevant to the matters at issue in the Complaint pertaining to Lencsak is Paragraph 67—the last paragraph of the Complaint's factual allegations. Paragraph 67 merely states that Lencsak is a contributory infringer because he had knowledge of Barrington's allegedly wrongful activity and "induced, caused, and materially contributed to said infringing conduct of Barrington." Plaintiffs do not attempt to state how Lencsak purportedly contributed to the allegedly wrongful conduct. Although the Complaint generally alleges that Lencsak had responsibility for Barrington's day-to-day business (see ¶ 22), the Complaint notably fails to specifically allege any involvement by Lencsak in the relevant transactions that are at issue in this case. (See generally ¶¶ 23-32.) This failure is fatal to plaintiffs' claims against Lencsak. See Softel, Inc. v. Dragon Medical and Scientific Communications, Inc., 118 F.3d 955, 971-72 (2d Cir. 1997) (granting judgment as a matter of law: "To establish contributory infringement, Softel was required to show that [the individual defendant officer] 'authorized the [infringing] use.'") (internal citations omitted); Cable News Network, L.P. v. GoSMS.com, Inc., No. 00 Civ. 4812(LMM), 2000 WL 1678039, at *6 (S.D.N.Y. Nov. 6, 2000) (granting 12(b)(6) motion: "Without allegations of acts of infringement, supervision or control over the direct infringers, or contribution to the infringement, the Court finds that plaintiffs' allegations are insufficient to plead either direct copyright or trademark infringement or either contributory infringement or vicarious liability."); Carell v. Shubert Organization, Inc., 104 F. Supp. 2d 236, 270-71 (S.D.N.Y. 2000) (granting 12(b)(6) motion as to certain individual defendants: "Absent from the Complaint is any description of acts that could lead to the conclusion of direct copyright or trademark infringement, or allegations of authorization or participation that would indicate vicarious liability or contributory infringement."); Sun Micro Medical Technologies Corp. v. Passport Health Communications, Inc., No. 06 Civ.2083(RWS), 2006 WL 3500702, at *12-13 (S.D.N.Y. Dec. 4, 2006) (dismissing copyright infringement claim where "there are no allegations that the Individual Defendants participated in, supervised, or controlled the alleged infringing actions of Passport-the party which allegedly committed copyright infringement").

"[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (internal quotations, citations, and alterations omitted). "Thus, unless a plaintiff's well-pleaded allegations have "nudged [its] claims across the line from conceivable to plausible, [the plaintiff's] complaint must be dismissed." Id. at 570. Plaintiffs' barebones allegations against Lencsak do not meet that threshold for any of the counts asserted against him, and thus, even if there was personal jurisdiction over Lencsak—which there is not—the Complaint fails to state a claim against Lencsak and should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

V. Conclusion

For the reasons stated above, Defendant George Lencsak respectfully requests that this Court dismiss with prejudice the claims against him in Plaintiffs' First Amended Complaint.

Dated: January 26, 2011
New York, New York

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